

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

HMR OF MARYLAND, LLC

Employer

and

Case 5-RC-15444

UNITED FOOD AND COMMERCIAL WORKERS,
UNION LOCAL 400, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held on August 23 and 26, 2002, before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The parties stipulated and I find that: HMR of Maryland (hereinafter the Employer), a limited liability corporation, is engaged in the business of operating a nursing home and assisted-living facility in Charlotte Hall, Maryland. The Employer took over the operations of this facility on June 1, 2002; and based on projections for the 12-month period after June 1, 2002, the Employer will derive gross revenues in excess of \$100,000 from the operation of this facility and will purchase and receive products, goods and materials valued in excess of \$5,000 directly from points located outside the State of Maryland.

The parties stipulated and I find that the United Food and Commercial Workers Union, Local 400, AFL-CIO (hereinafter the Union or Petitioner) is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (hereinafter the Act).

The Petitioner filed a petition seeking to represent employees in the following unit, which includes between 25-34 employees:

All regular full time and part time LPN's and RN's, but excluding all owners, supervisors, casual employees and guards as defined by the Act.

The parties stipulated that the director of nursing (DON), Karen Getz, assistant director of nursing (ADON), Evelyn Ashe, and delegating nurse, Melinda Gloriod, are to be excluded from any appropriate unit as supervisors within the meaning of the Act. The parties further stipulated that the position of care plan coordinator is to be excluded from any appropriate unit. Further, the Petitioner does not seek to include in an appropriate unit the classification of shift or floating supervisor.¹

The parties agree there is no contract bar, or any other bars, to an election.

There is no history of collective bargaining between the Union and the Employer with respect to the above-described petitioned-for Unit. The Union is currently the exclusive collective-bargaining representative of a unit covering the service and maintenance employees, which include certified medicine aides (CMAs), geriatric nursing assistants (GNAs) and certified nursing assistants (CNAs).

I. DISPUTED ISSUES

Whether all licensed practical nurses (LPNs) and/or registered nurses (RNs), who serve as shift supervisors, unit managers and charge nurses, are supervisors within the meaning of Section 2(11) of the Act.²

II. POSITIONS OF THE PARTIES

PETITIONER

The Petitioner contends that the charge nurses and unit managers are not supervisors within the meaning of the Act and, thus, the petitioned-for Unit is appropriate for the purpose of collective bargaining.

EMPLOYER

The Employer contends that the petitioned-for Unit is comprised exclusively of LPNs and RNs who serve in a supervisory capacity within the meaning of the Act, either as a charge nurse, unit manager or shift supervisor, and, thus, the petitioned-for Unit is not appropriate for the purpose of collective bargaining. The Employer argues that the nurses in dispute have the authority to discipline, evaluate, assign and responsibly direct employees within the meaning of Section 2(11) of the Act. Accordingly, the petition should be dismissed.

¹ No person presently is employed on this classification. The Employer currently is seeking applicants to fill this classification, which it referred to as "evening and weekend supervisor." The record does not reveal how many of these individuals the Employer intends to hire.

² All other employees employed by the Employer are represented for collective bargaining purposes in a separate unit, except for the staffing coordinator, a clerical employee who neither party seeks to include herein.

Based on the record as a whole and the reasons stated below, I find that the shift supervisors and unit managers are statutory supervisors within the meaning of Section 2(11) of the Act. I further find that the Employer has not carried its burden of establishing that the charge nurses are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I will direct an election in the appropriate unit found here.

III. OVERVIEW OF OPERATIONS

The Employer operates the Charlotte Hall Veteran's Home, a facility used to provide care for honorably discharged veteran residents of the State of Maryland. The facility has two parts: comprehensive care, which operates like a regular nursing home, and assisted living.³

A. NURSING HOME

Karen Getz serves as the director of nursing for the nursing home. The assistant director of nursing is Evelyn Ashe. Below the DON and ADON are three unit managers, all of whom are RN's: Dorothy Stewart, Margaret Jenkins and Barbara Castle. There are approximately 30 licensed nurses in the nursing department. The nursing home staff also includes geriatric nursing assistants and certified medicine aides.

The nursing home has a total of 278 beds, covered by five nursing units: an Alzheimer's unit, a skilled unit and three comprehensive care units. Four of the nursing units operate 42 beds apiece and one unit has 40 beds. At the time of the hearing, the Alzheimer's unit cared for about 30 residents; the skilled unit cared for about 32 residents; and the other three units each had about 41-42 residents. The units are designated by floor, 1-3, and wing, B or C. The Alzheimer's unit is on 1C; the skilled unit is on 3C; and the other units are located at 1B, 2B and 2C, respectively. Stewart is the unit manager for 1B and assists with paperwork on 2C; Jenkins is the unit manager for 1C and assists with the paperwork on 2C; and Castle is primarily responsible for 3C and will assist the other units as needed. Units 2B and 2C do not have designated unit managers.⁴

The Employer operates three shifts, Monday through Friday: 7:00am-3:00pm; 3:00pm-11:00pm; and 11:00pm to 7:00am, as well as weekend shifts.⁵ Getz, Ashe and the unit managers work the day shift (7:00am-3:00pm), Monday through Friday. No unit managers are currently assigned to the evening (3:00pm-11:00pm), night (11:00pm to 7:00am) or weekend shifts. Each unit normally has a charge nurse, medicine aide and 3-4 nursing assistants on each shift. On the evening, night and weekend shifts, there also may be a separate individual who acts as a "free-floating" supervisor, also known as shift supervisor. If there is no floating supervisor, a charge nurse will also be designated the shift supervisor. The floating or shift supervisor is responsible for the entire building. Getz testified that a charge nurse also works as the shift supervisor about three for four nights per week. The record, however, fails to indicate how the shift supervisor is selected, the number of individuals who serve as shift supervisor and how often they serve in that role. The charge nurse or shift supervisor positions are filled by either an LPN or RN.

³ The parties stipulated at the hearing that should the RNs and LPNs be found to be non-supervisors, they would be included in an appropriate unit regardless of whether they work in the nursing home or in assisted living.

⁴ The record is silent as to whether those positions will be permanently filled.

⁵ The number of shifts on a weekend is unknown.

The DON is responsible for overseeing all aspects of the nursing department, including personnel and care of the residents. Getz testified that on a normal day, the first thing she will check is the "24-hour report," which indicates whether there is a change in a resident's condition. If there is a change, she usually goes to the unit and asks the charge nurse what happened. Getz also said she meets with the unit managers to discuss the status of each unit and whether there are any problems. Getz also attends various meetings, conducts interviews and does paperwork. Getz testified that the ADON has similar responsibilities as herself, but the ADON is also responsible for specific reports concerning the building. Both the DON and ADON are on-call, 24 hours a day, seven days a week. If something out of the ordinary occurs, i.e., a resident elopes from the building, the charge nurse will notify the shift supervisor who will then call the DON. Incidents concerning alleged employee misconduct are reported to the DON, who then conducts an investigation and determines whether discipline will issue.

The unit manager, also referred to as unit coordinator, is responsible for overseeing the charge nurse, CMA and GNAs on her unit. According to the unit manager's job description, the main function of the unit manager is to provide leadership and direction for the assigned unit and assure delivery of quality resident care; maintain an orderly system for the implementation of resident care; assure all medications and treatments are properly administered and that all physicians' orders are carried out in an appropriate and timely manner following policy and procedure. In addition, the unit manager's duties include supervising and evaluating unit checks; adjusting unit staffing; and interview/recruit staff. Getz testified that the unit manager's duties are similar to the shift supervisor, described below, but that the unit manager is also responsible for making sure the Employer is in compliance with state and federal regulations by updating the necessary forms. The unit manager performs audits and attends meetings where issues such as weight, skin condition and falls are discussed. According to the job description, the unit manager also attends weekly care plan and unit coordinator/supervisor meetings. The unit manager is responsible for evaluating the performance of the charge nurse. The unit manager can be called at any time if there is a problem with her unit and rotates being on call on weekends with the DON, ADON and care plan coordinators.

The job description for shift supervisor indicates that the shift supervisor has the following duties, among others: participates in formulating, interpreting and implementing department objectives of providing quality resident care; evaluates performance of all nursing staff; may initiate or recommend discipline, promotion, transfer, salary adjustments or other personnel transactions; may participate in the grievance process; attends supervisor meetings; and in the absence of the administrator and DON, is responsible for administrative and operational decisions of the facility. The shift supervisor is the sole "supervisor" present during her shift and is responsible for the entire building. Nurses receive an additional dollar per hour above their standard wage when acting as shift supervisor.

The job description of a charge nurse states that a charge nurse is responsible and accountable for the effective overall management of a nursing unit and the provision of quality nursing care to all residents. The charge nurse job description lists, among other things, the following duties: practices professional nursing that is consistent with the Department of Nursing philosophy, objectives and standards; assess the competence and performance of nursing staff as related to position description, standards of care and facility policies; organizes and monitors human and material resources necessary for meeting the needs of the designated nursing unit; and directs, supervises and assists care given by other nursing personnel. The

charge nurse is responsible for the overall supervision of the nursing assistants and the medicine aides in her unit. The charge nurse spends about 40% of her workday performing hands-on patient care, according to Getz. Some procedures, such as putting a feed through a gastrostomy tube and skin assessments, have to be performed by a licensed nurse.

LPN Jonmarie Huffman testified on behalf of the Petitioner. Huffman testified that she sometimes acts as a staff nurse and sometimes as a charge nurse.⁶ Huffman said she works as a charge nurse on the day shift three times a week. Huffman testified that as a charge nurse she spends about 60% doing direct patient care and 30-40% of her time doing paperwork. As a staff nurse, Huffman said she spends about 80% performing hands-on patient care and 20% doing paperwork. Huffman said she serves as a charge nurse when it is indicated on the staff list, which is prepared by the staffing coordinator.⁷ If she assesses that a resident's condition has changed, Huffman said she would consult her unit manager, Barbara Castle. Huffman further testified that if she has a problem, she will go to the unit manager.⁸

The geriatric nursing assistant job description indicates that the nursing assistant is responsible to the charge nurse. The job description indicates that the nursing assistant is to provide routine nursing care and services as "directed by your supervisor," who, according to Getz, is the charge nurse. The nursing assistant is responsible for performing various tasks for a resident, such as bathing, feeding, turning and repositioning the resident; cleaning and restocking the residents' room, changing linens, taking vital signs, and distributing and picking up meal trays. The nursing assistant is also responsible for documenting that these tasks have been performed.

The nursing department utilizes a Nursing Department Policy and Procedure Manual, which is a comprehensive manual for patient care, i.e., how to take temperature, blood pressure, make a bed, serve a tray. All employees are expected to be familiar with the manual and are subject to discipline for performing a procedure without following it. The unit manager or shift supervisor makes sure the nurse follows the manual.

The nursing department also uses resident care plans, which determine what type of care a resident needs. All licensed nurses are required to follow the resident care plan and failure to follow it could result in discipline. A resident care plan is prepared by a care plan coordinator with information from the nursing, dietary, social services departments, nurses, physical therapist, occupational therapist, the resident and his family. Getz testified that the unit managers also assist with preparing resident care plans and see to it that information from the care plan gets transferred on to a nursing assistant's team assignment sheet.

Team assignment sheets establish teams of nursing assistants and medicine aides with residents depending on the acuity of the resident. Getz testified that the assignment sheets are prepared in advance of the shift by the unit manager and charge nurse. Huffman, however, testified that the team assignment sheets are typically prepared by the unit manager. When an

⁶ DON Getz testified that all nurses are "charge" nurses, whom the Employer contends are supervisors under Section 2(11) of the Act. In light of my finding, discussed below, to include the charge nurses in the appropriate unit found here, it is inconsequential whether there is a "staff" nurse designation.

⁷ As discussed below, the staffing coordinator is a clerical who prepares the monthly work schedule and daily staffing sheet.

⁸ Huffman previously served as a unit manager for about a year.

assistant reports to work, the charge nurse gives her the team assignment sheet, which indicates the residents that will be under her care. The majority of the time, the staff stays with the same unit or team. Getz testified that by the nursing assistants staying with the same unit, they feel it is easier to take care of the residents because they get to know the residents better. If changes are necessary due to absences or changes to the condition of the resident, the charge nurse may modify the assignment sheet. Huffman said that if she modifies the assignment sheet, she usually tells her unit manager. Changes to assignment sheets are based on the number of residents and the acuity of the resident. Getz testified that, for example, if a nursing assistant had several residents that required an extensive amount of care, the charge nurse may rearrange assignments by giving two residents requiring lighter care to one assistant and one resident requiring heavy care to another assistant to divide up the workload evenly. A charge nurse may also make an assignment change if a resident or family member dislikes a certain nursing assistant.

The nursing assistants use a flow sheet to mark off the duties they have performed that day. One reason for the flow sheet is to prove that care has been provided to the resident. The charge nurse is ultimately responsible for making sure the nursing assistant performs all the duties on the flow sheet. The charge nurse makes rounds to ensure that the nursing assistants and medicine aides carry out their assigned duties. The charge nurse fills out a charge nurse worksheet every shift, which includes a list of 20-25 tasks the charge nurse is to perform. If a nursing assistant fails to perform a task, the charge nurse will typically investigate why the task was not performed and get the assistant to perform the task. Huffman testified that she might only need to talk to an assistant once a day concerning something the assistant failed to do and that there are days when this does not occur. Moreover, Huffman said that the assistants tend to work with the same patients and are familiar with what they are supposed to do.

Nursing assistants are to report grievances or complaints by residents to the charge nurse. The charge nurse handles complaints from residents' family members as well. Changes in the condition of a resident or broken equipment are to be reported to the charge nurse. With respect to broken equipment, the charge nurse will fill out a request to have the maintenance department repair it. If the equipment needs immediate repair, the charge nurse may notify the DON.

The staffing coordinator, a clerical, prepares a work schedule every month and prepares a staffing sheet on a daily basis. The daily schedule determines the unit in which the nurses and CNAs will work. The staff normally stays in the same unit. According to Huffman, if her unit changes, that change is made by the staffing coordinator. If additional staff is needed, the staffing coordinator is responsible for trying to fill the void. The staffing coordinator arranges for overtime work either by asking other staff or calling staffing agencies. When the staffing coordinator is not available, the designated shift supervisor may arrange for overtime work. The shift supervisor may not mandate that an employee come in. If a nursing assistant calls in to say she cannot come to work, the call initially is handled by the designated shift or floating supervisor. The shift supervisor will then talk to the charge nurse to discuss whether any assignment changes are necessary. According to Getz, the charge nurse determines when a nursing assistant takes a break or if she can leave her work area or leave early.

DON Getz testified that the charge nurse may issue discipline at the first level.⁹ If a nursing assistant fails to complete a task or follow the charge nurse's instructions, Getz said the charge nurse may discipline the assistant in the form of a verbal warning or counseling. According to Getz, a charge nurse may also issue written disciplinary notes that are placed in the employee's personnel file. The Employer introduced several exhibits purporting to be disciplinary notices issued by persons in the disputed classifications. These "notices" were placed in the respective employees' personnel files. Only one "notice" was clearly issued by a charge nurse, one was issued by a unit manager and the others were initiated by shift supervisors. Some of these incidents were reported on "personnel action" forms or notices¹⁰ and some appear to be in memorandum form. For example, a charge nurse describes in a memorandum to the DON, how she found a nursing assistant sleeping on the job. After the DON spoke with the charge nurse, it was determined that the Employer would no longer use the assistant, who was from a staffing agency. One personnel action form indicates that a verbal warning was issued to a GNA by a floating supervisor for failing to follow the dress code. Another personnel action form was issued by a unit manager to a charge nurse for defective and improper work.

On cross-examination, Getz testified that the purported disciplinary notices do not recommend discipline. Getz said that incidents are typically reported to her and that she conducts her own investigation of the incident, which includes talking to the nurse reporting the incident and the employee at issue. After the investigation, Getz makes a determination whether to issue discipline. Getz went on to testify, however, that sometimes she does not see the personnel action or written warning that is issued. She stated that if a nurse issues a disciplinary notice to an employee and the employee signs it without complaint, the discipline goes straight to the employee's personnel file and she would not see the form unless the employee appeals the disciplinary action.

Charge nurse Huffman testified that she can write someone up for insubordination, for example, for fighting or if she suspected a staff member is under the influence of alcohol or drugs. However, upon further testimony, Huffman said she does not make a recommendation whether discipline should be issued, she simply reports the matter to the DON who then makes the discipline decision. Huffman said she has never taken a disciplinary action herself and has never issued a personnel action form directly to an employee, always giving the form to the DON. Huffman confirmed Getz's testimony that the DON conducts an investigation when she receives a personnel action form.¹¹

Getz testified that charge nurses typically prepare written evaluations for nursing assistants and CMAs. Charge nurses are evaluated by the unit managers, who are evaluated by the DON and ADON. Huffman testified that she did two employee evaluations when she served as a unit manager but has not evaluated any employees as a charge nurse. The record is silent as to whether these evaluations are linked to wages, pay raises or employee retention.

⁹ Getz testified that the Employer has a progressive disciplinary system: verbal warning, written warning, suspension, and termination.

¹⁰ Below the heading of the document, states: "The following [warning][separation] was issued today and it is to be made part of the employee record." There are fifteen different types of misconduct, i.e., unreported absence, tardiness, drinking on duty, insubordination, which may be checked off. There are also signature lines for the supervisor, employee and administrator.

¹¹ There was also testimony given concerning incident reports, which differ from a personnel action form. An incident report is completed if a resident falls, a resident reports missing objects or money, there is an altercation between two residents or if a resident has an injury. Any staff member can fill out an incident report.

B. ASSISTED LIVING

The assisted living unit of the Employer is headed up by the delegating nurse, Melinda Gloriod. The assisted living unit houses about 74 residents and has the capacity for 94 residents. The residents range from those who need assistance with bathing and dressing to those who are fully independent. There are four LPNs in assisted living who serve as charge nurses: Gloria Connelly, Joan Neal, Pat Baker and Pam Dwyer. The staff also includes an RN, who is on maternity leave, and CMAs and CNAs.

The residents' floor location is determined by their level of acuity: Level 1's are independent and located on the 3rd floor; Level 2's need moderate care and are located on the 2nd or 1st floors; and Level 3's need extensive care and are on the first floor. About 33 residents are located on the first floor; about 30 on the second floor and 10 on the third floor.

Gloriod works on the day shift (8:30am to 5:00pm) and reports directly to the administrator, Steve Wynn. Wynn also serves as the administrator for the nursing home. Gloriod is on-call 24 hours a day. Also on the day shift are an LPN, who is located on the first floor, a CMA on the second floor, and five CNAs: three on the first floor, one on the second and one assistant is a floater. The evening shift (3:00pm to 11:30pm) has one LPN, one CMA and three CNAs. The night shift has one LPN, once CMA and two CNAs. On Saturday and Sunday, there are only three CNAs on the day shift.

As the delegating nurse, Gloriod does not perform direct patient care. She does "QA", scheduling and deals with family issues involving residents. Gloriod prepares a master schedule of the staff's hours and assignments on a monthly basis. Gloriod may change the schedule, for example, if someone puts in a written request for a day off. A written request for leave goes straight to the delegating nurse. Gloriod further testified that the work schedule is set for a while and unless there is a new resident or somebody leaves, the schedule typically does not change. However, Gloriod said the charge nurse can change the schedule if necessary.

The job description for the charge nurse in assisted living states that she is to do the following, among other things: assure that all necessary health services progress smoothly; to monitor and assure all medications and superficial treatments are properly self administered by resident or done by the appropriate staff; to maintain an orderly system for the implementation of documentation regarding residents and their well being; and to arrange, schedule, coordinate and otherwise expedite the implementation of resident care by other providers.

CNAs perform bathing, dressing, bed changes, laundry, cleaning, feeding checking vital signs and weight. The charge nurse assigns the CNA her tasks and makes sure they are carried out. The assisted living unit uses a service plan book, which is a list of what the CNA needs to do for a resident that day. The service plan is based on 45- and 90-day medication reviews and doctors' evaluations. The CNA reviews the service plan book to determine the tasks she must perform for each resident and then checks off the list once the work has been performed. According to Gloriod, the charge nurse has the discretion to change an assistant's task, i.e., whether to give a resident a bath.

If an assistant calls in, she would have to talk to the charge nurse. The charge nurse decides if she needs somebody to fill in and whom to call. However, a charge nurse cannot order

a CNA to come in to work or mandate that a CNA work overtime. Gloriod also has suggested that the charge nurses use staff that would not be eligible for overtime before using those that would be eligible. Gloriod has given the charge nurses approval to call a staffing agency if necessary. A charge nurse may assign a CNA to another floor if necessary and approve leave if an assistant wishes to leave early.

The Employer introduced into evidence two personnel action forms, both of which were issued by a charge nurse to the same CNA for separate instances of “no call/no show.” However, Gloriod testified that the forms did not impose any discipline as she has yet to meet with the employee at issue. Gloriod further testified that she ultimately will decide whether to issue discipline after talking to the employee. A problem such as an altercation between residents or a resident and assistant is handled directly by the delegating nurse. Issues such as those involving tray lines or bathing are handled by the charge nurse. Gloriod testified that the charge nurse should bring problems to her attention but should try to resolve them first. Any problems with residents are to be reported to the charge nurse. Gloriod testified that she has a good staff that work very hard and do what they are supposed to do.

IV. ANALYSIS

A. LEGAL OVERVIEW

Section 2(3) of the Act excludes from the definition of “employee” “any individual employed as a supervisor.” Section 2(11) defines “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In determining whether a person is a statutory supervisor, the Board examines whether the person in question exercises any of the functions listed in Section 2(11), uses independent judgment in performing any of those supervisory functions, and does so in the interest of management. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives,” and employees, such as “straw bosses, leadmen, set-up men, and other minor supervisory employees,” who enjoy the Act’s protections even though they perform “minor supervisory duties.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Senate Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

A party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. *Golden Fan Inn*, 281 NLRB 226, 229-30 n.12 (1986); see also *Northern Montana Health Care Center*, 324 NLRB 752 (1997); *Bennett Industries, Inc.*, 313 NLRB 1363 (1994); *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). Conclusory evidence, “without

specific explanation that the [disputed person or classification] in fact exercised independent judgment," does not establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Furthermore, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Initially, in *Kentucky River*, the Supreme Court approved the Board's well-established precedent that the party asserting supervisory status has the burden of proof to establish such status. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1867 (2001). Here, the Employer asserts that the RNs and LPNs are statutory supervisors and therefore bears the burden of proof to establish supervisory status. A statutory supervisor must possess at least one of the indicia specified in Section 2(11) of the Act. *Id.* at 1867; *Queen Mary*, 317 NLRB 1303 (1995); *Allen Services Co., Inc.*, 314 NLRB 1060 (1994). Moreover, a statutory supervisor must exercise supervisory indicia in a manner requiring the use of independent judgment. With respect to most Section 2(11) indicia, the use of independent judgment is self-evident. However, when considering the supervisory authority to responsibly direct, it is more difficult, particularly in the health care industry, to define the use of independent judgment. In the health care field, the Board previously held that employees do not use independent discretion when they exercise ordinary professional or technical judgment in directing less skilled employees to deliver services in accordance with employer specified standards. In *Kentucky River*, the Supreme Court rejected this categorical exclusion. Rather, the Supreme Court found that such a categorical exclusion was improper, overbroad and "contrary to the statutory language." *Kentucky River Community Care, Inc.*, *supra* at 1871.

Although the Supreme Court rejected the Board's categorical exclusion of professional judgment from Section 2(11) independent judgment, it did accept two aspects of the Board's interpretation of independent judgment. The Supreme Court agreed with the Board that independent judgment is ambiguous and that many nominal supervisory functions may be performed without the exercise of such a degree of judgment or discretion as would warrant a finding of supervisory status under the Act. *Kentucky River Community Care*, *supra* at 1867. The Supreme Court also recognized that judgment may be reduced below the statutory supervisory threshold by detailed regulations issued by an employer. *Ibid.* See also *Dynamic Science, Inc.*, 334 NLRB No. 57 (2001) (citing *Kentucky River*). Moreover, in *Kentucky River*, the Supreme Court held that the Board has discretion to determine the scope of judgment that qualifies as independent judgment within the meaning of Section 2(11) of the Act.

In *Kentucky River*, the Supreme Court noted that the Board defended its categorical exclusion based on policy considerations because it sought to preserve the inclusion of professional employees within the coverage of the Act. *Kentucky River Community Care*, 121 S.Ct. at 1870. The Supreme Court found that the question presented did not involve the soundness of that labor policy which the Board was entitled to judge without second-guessing by the Court. Rather, the Supreme Court noted that the policy could not be given effect through the categorical exclusion of professional judgment from the meaning of independent judgment contained in Section 2(11) of the Act. The Supreme Court, citing *Providence Hospital*, 320 NLRB 717, 729 (1996), went on to suggest that the policy favoring the Act's coverage of professional employees might be accomplished by developing a "limiting interpretation of the supervisory function of responsible

direction” that distinguishes employees who direct the manner of others’ performance of discrete tasks from employees who direct other employees. *Kentucky River Community Care*, supra.

In *Kentucky River*, the Supreme Court did not hold that all nurses are supervisors. Indeed, the Court did not even discuss the job duties of the nurses at issue nor did it decide whether those individuals are supervisors. Thus, the determination of the supervisory status of nurses and other individuals remains a fact-specific inquiry.

Applying these criteria to the instant case, for the reasons set forth below, I conclude that the shift supervisors and unit managers are statutory supervisors. Further, I conclude that the Employer has not demonstrated that the charge nurses are supervisors with the meaning of Section 2(11) of the Act.

B. STATUS OF SHIFT SUPERVISORS

The Petitioner does not seek to represent the shift or floating supervisors, as it believes that position to be supervisory. However, the Petitioner asserts that even though the RNs or LPNs may substitute for the shift supervisor, they are not supervisors. The record indicates that there is a shift supervisor position on the evening and night shifts and on weekends and that this position is currently filled by an LPN or RN, apparently on a rotating basis. The record also reveals that a charge nurse may simultaneously act as shift supervisor 3-4 nights a week. However, the record is void of any evidence indicating how many individuals actually serve as shift supervisor, their identity, how often they serve in this capacity, or how they are even chosen for this role. In addition, it is not known how many shifts the Employer operates on the weekend. The Employer is seeking to permanently fill the currently vacant shift supervisor positions.

It appears there is no dispute that the shift supervisor is a supervisor within the meaning of Section 2(11) of the Act. The job description of a shift supervisor, as well as record testimony, indicates that the shift supervisor position possesses statutory supervisory indicia requiring the use of independent judgment. In this regard, the job description indicates that the shift supervisor “may initiate or recommend discipline, promotion, transfer, salary adjustments or other personnel transactions.” Moreover, the record contains several examples of “personnel action” notices issued by shift or floating supervisors to employees. As discussed in greater detail below, such personnel action notices constitute written disciplines. The shift supervisor is also the *sole* supervisory position in the Employer’s facility during the evening, night and weekend shifts. Further, the shift supervisor position is paid an additional dollar an hour above the normal wage for RNs and LPNs.

The Employer seemingly contends that it has met its burden by demonstrating that the disputed individuals sometime serve as shift supervisors and, thus, they should be excluded from the unit on that basis. I disagree. Where an employee completely takes over the supervisory duties of another, he is regarded as a supervisor under the Act. *Birmingham Fabricating Co.*, 140 NLRB 640 (1963); *Illinois Power Co.*, 155 NLRB 1097 (1965). However, isolated supervisory substitution does not warrant a supervisory finding. *Latas de Alumino Reynolds*, 276 NLRB 1313 (1985). The Board has stated that, where intermittent supervision of unit employees is involved, the test is whether the part-

time supervisors spent a “regular and substantial” portion of their time performing supervisory duties, or whether such substitution is sporadic and insignificant. *Carlisle Engineered Products, Inc.*, 330 NLRB 1359 (2000) and *Aladdin Hotel*, 270 NLRB 838 (1994). Here, the record is void of any evidence indicating which individuals fill in the shift supervisory positions, how they are selected, or the frequency with which they serve in this role. Thus, the Employer has failed to establish that the RNs and LPNs at issue spend a “regular and substantial” portion of their time performing supervisory duties in serving in the capacity of shift supervisor. The only certainty from the record is that an unidentified number of nurses (perhaps some; perhaps all) rotate in filling the shift supervisor position. The Board has held, however, that rotating “supervisors” among equals does not make those employees statutory supervisors, since they are not vested with genuine management authority. See *General Dynamics Corp.*, 213 NLRB 851, 858-859 (1974); *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB 1049, 1051 (1971). Due to the noted lack of evidence, the Employer has failed to establish that the nurses regularly serve as substitute supervisors.

Under these circumstances, I conclude, seemingly in agreement with the parties, that the shift supervisor position is supervisory within the meaning of Section 2(11) of the Act and, thus, I will exclude that classification from the unit. However, for the reasons cited above, I find that the Employer has not met its burden to establish that all RNs and LPNs are supervisors within the meaning of the Act by virtue that they may on occasion act in the capacity of shift supervisor.

C. STATUS OF UNIT MANAGERS

The Employer contends that the unit manager’s supervisory responsibilities, including the unit manager’s authority to discipline and evaluate employees, establishes that they are supervisors within the meaning of Section 2(11) of the Act. The Employer argues that the unit managers’ evaluation of charge nurses is evidence of their supervisory authority. However, there is no indication that the evaluations have any affect on the charge nurses’ wages or retention. Thus, I cannot find that the unit managers exercise supervisory authority based on their evaluation of charge nurses. See, e.g., *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1335 (2000). For the following reasons, however, I conclude that the Employer has met its burden of establishing that the unit managers are statutory supervisors.

The record establishes that the unit managers have the authority to issue, and in fact have issued, disciplinary actions to charge nurses, i.e. written warnings that are placed in employees’ personnel files. For example, there is evidence in the record that a unit manager issued a “personnel action” notice to a charge nurse for defective and improper work and for being careless. When asked about this particular discipline, Getz testified that she did nothing with it, as her name was not on the document. Thus, it appears that the unit manager in this instance issued the written discipline without prior approval and without any independent investigation by the DON or any higher authority. This is consistent with Getz’s testimony that she does not necessarily see every disciplinary action and that such actions may go directly to an employee’s personnel file. Getz did testify on cross-examination that the instant personnel action notice did not “recommend” discipline. However, Getz further testified that the notice was the “first

step.”¹² In any event, the personnel action notice, as prepared in this instance, appears to be a written warning. Thus, based on the record as a whole, I find that the personnel action notice as issued by the unit manager in this case is not simply reportorial in nature. Rather, I find that it constitutes the imposition of discipline -- an exercise of supervisory authority within the meaning of Section 2(11) of the Act.

The unit managers’ supervisory authority is also evident based on their managerial responsibilities and their status in the nursing home hierarchy. The unit manager is the third-highest ranking supervisor in the nursing home, behind the DON and ADON, during the day shift. The unit manager is responsible for leading and directing her unit, which includes the charge nurse and nursing assistants, in providing quality resident care. In addition, the unit manager is responsible for keeping the Employer in compliance with state and federal regulations through extensive documentation. The unit managers attend supervisory meetings, including meetings with the DON regarding any problems with their units. The unit manager also attends resident care plan meetings and is responsible for transferring information from the care plan to team assignment sheets. Further, the unit managers are always on call, just as the DON and ADON.

Based on the foregoing, I find that the unit managers possess supervisory authority, in particular the authority to effectively recommend and issue discipline, within the meaning of Section 2(11) of the Act. Accordingly, I will exclude the three unit managers from any unit found appropriate here.

D. STATUS OF CHARGE NURSES

The Employer relies on four Section 2(11) indicia – discipline, evaluation, assignment and responsible direction – in arguing that the charge nurses are supervisors under the Act. There is no evidence that the charge nurses possess the authority to hire or fire or any other supervisory indicia other than the criteria listed above. For the reasons set forth below, I find that the Employer has not met its burden to establish that charge nurses are supervisors within Section 2(11) of the Act.

1. Discipline

As discussed above, the Employer presented several purported disciplinary notices as evidence of the licensed nurses’ supervisory authority. However, only one of the purported disciplinary notices was clearly issued by a charge nurse.¹³ In that instance, a charge nurse reported to the DON, in a memorandum, not a “personnel action” notice, that she found a nursing assistant sleeping on the job. According to Getz, after she spoke with the charge nurse, it was determined that the Employer would no longer use the assistant, who was from a staffing agency and not a permanent employee. However, there is no testimony that the charge nurse

¹² Written warnings are part of the Employer’s progressive disciplinary policy.

¹³ The Employer contends that Exhibits 10 and 12, which were issued in 1991 and 1997, respectively, also are examples of disciplinary actions issued by charge nurses. However, the record is not clear as to what position the nurses involved in each of those instances held at the time. Further, based on the testimony of delegating nurse, Melinda Gloriod, Employer Exhibits 21 and 22, both of which were written up by an assisted living charge nurse, are not “disciplines” as Gloriod has yet to meet with the assistant involved in those incidents to make a determination whether discipline will issue.

recommended any discipline to the DON during their discussion of the incident. Moreover, the memorandum is purely reportorial as it clearly does not involve the imposition or recommendation for discipline. The Employer argues that the notices themselves are the discipline. However, the instant notice was not issued on a “personnel action” notice, which, as discussed above, appear to be written warnings. The memorandum here does not impose or recommend discipline; the charge nurse merely reports to the DON what she observed. While the memorandum resulted in the agency employee being no longer used, such action was not taken without independent investigation by the DON and, as stated above, apparently without any recommendation of discipline from the charge nurse. The Board has consistently held that warnings that do not result in any personnel action or, if they do, but are not taken without independent investigation, fail to establish supervisory authority. See, e.g., *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Passavant Health Center*, 284 NLRB 887 (1987).

There is testimony that charge nurses have the authority to issue “personnel action” notices, however, there is no specific evidence in the record that a charge nurse has exercised such authority in a manner that has resulted in an adverse employment action. As stated above, all personnel action forms or notices on record were issued by either a shift or floating supervisor or a unit manager. While Huffman testified that she has filled out personnel action forms before concerning nursing assistants, she also testified that she gives such forms to the DON, not the employee, and that the DON conducts her own investigation. Therefore, the only clear evidence on record establishes that the charge nurse’s authority to issue written incident reports concerning purported unacceptable behavior is reportorial in nature, not supervisory.

In addition, the Employer contends that charge nurses can verbally counsel or warn a nursing assistant if the assistant fails to perform a task. However, this conclusory testimony fails to establish that such counseling or warning results in any adverse employment action. Indeed, the record indicates that typically the charge nurse will simply tell the assistant to perform the task. Based upon careful review of the record, it is apparent that these limited corrective and reportorial functions by charge nurses are not indicative of supervisory status because they do not involve the imposition or recommendation of adverse employment actions and do not, therefore, constitute discipline. *Crittenton Hospital*, 328 NLRB 879 (1999); *Illinois Veterans Home*, 323 NLRB 890 (1997).

2. Evaluation

The record concerning the charge nurses’ role in evaluating employees clearly fails to establish that they possess Section 2(11) authority. In this regard, general testimony establishes that charge nurses are responsible for evaluating nursing assistants and medicine aides. The record contains three performance evaluations conducted by charge nurses, all of which were signed by the nurse and DON. However, it is unclear how much weight is given to the charge nurses’ observations in the employee’s final evaluation. Significantly, the record is void of any evidence indicating whether the evaluations have any direct correlation on employee wages or retention. Therefore, the evidence fails to establish that the charge nurses evaluations constitute effective recommendations or that such recommendations require the exercise of any supervisory indicia. *Harborside Healthcare, Inc.*, supra at 1335; *Children’s Farm Home*, 324 NLRB 61 (1997).

3. Assignment

The evidence also fails to establish that the charge nurses assign employees requiring the use of independent judgment. On the nursing home side, the staffing coordinator creates the monthly work schedule and daily staffing sheets; in the assisted living unit, the work schedule is prepared by the delegating nurse. Thus, the number of assistants and the specific individuals assigned to each unit is pre-determined. The record also establishes that nursing assistants normally stay on the same team and with the same patients. Moreover, staffing shortages and obtaining staff for overtime are handled primarily by the staffing coordinator or shift supervisor. While charge nurses may modify assistants' assignments due to a new patient or changes in the condition of a new patient, such changes will typically be made to equalize the workload. Such assignments, made to equalize employees' workload on a rotational or otherwise rational basis do not require the use of independent judgment. *King Broadcasting Co., d/b/a KGW-TV*, 329 NLRB 378, 382 (1999); *Providence Hospital*, 320 NLRB 717, 727 (1996); *Ohio Masonic Home*, 295 NLRB 390, 395 (1989). Further, the charge nurses' authority to allow breaks and employees to leave early has been held to be routine in nature. *Washington Nursing Home, Inc.*, 321 NLRB 366 n. 4 (1996).

4. Responsible Direction

I conclude that the charge nurses do not responsibly direct employees using independent judgment. The charge nurses direct employees to perform discrete tasks, such as feeding, bathing, or turning a resident, rather than directing employees in general. The tasks they assign to the staff are delineated in the job descriptions for each job classification as well as in the policy and procedures manual that sets forth protocols and standard operating procedures. In assigning tasks, charge nurses must also follow the residents' care plans and physicians' orders. Staff members are typically assigned to the same teams and generally know which tasks they are responsible for and how to accomplish those tasks. The record fails to establish that charge nurses deviate from care plans and standard operating procedures in assigning tasks to staff members.

The record establishes that charge nurses on the nursing home side have some input in creating team assignment sheets, however, it does not appear that function requires the use of independent judgment. In this regard, there is testimony that the charge nurse prepares the assignment sheet along with the unit manager. However, Huffman testified that the unit manager, who is ultimately responsible for the unit, typically prepares the assignment sheet. In addition, the Employer utilizes resident care plans, and on the assisted living side, service plans, which determine the type of care a resident requires. Moreover, it is the unit manager who is responsible for transferring information from the care plan to the assignment sheets. The Employer also uses a comprehensive policy and procedures manual which instructs the entire staff on why and how it performs various patient care procedures. Charge nurses follow a charge nurse worksheet which lists the 20-25 tasks that they are to perform on a daily basis. Similarly, nursing assistants use a flow sheet which details the tasks they are to perform for each resident. Therefore, assignments are tailored to a residents' care plan or doctor's orders, and, thus, any use of independent judgment by a charge nurse in changing an assistants' assignments is greatly circumscribed by the care plan, pre-determined tasks, and the policy and procedures manual.

Although the charge nurses are responsible for ensuring that the nursing assistants and medicine aides perform their tasks in a timely and proper manner, the mere act of determining whether particular tasks have, in fact, been performed does not require the use of independent judgment where the performance of such tasks is well-documented and therefore readily ascertainable without exercising discretion. Indeed, it appears that is unnecessary for the charge nurse to direct every aspect of the nursing assistant's work.¹⁴ The staff typically stays with their same teams and know their daily routine functions without specific direction from the charge nurse. While a charge nurse may use her discretion in directing an assistant to perform a discrete task after assessing a change in a resident's condition, such direction does not necessarily translate to the exercise of independent judgment in responsibly directing employees. In this regard, the charge nurse's discretion is severely constrained by the residents' care plan and the policy and procedures manual, which predetermine the employee to perform the task and the manner in which the task is to be performed. Further, under certain circumstances, the charge nurse will consult the unit manager, who is always on call, or doctor before changing an assistant's treatment of a resident. Moreover, if something out of the ordinary occurs, the charge nurse or a shift supervisor will call the DON, who is on-call 24 hours a day. Under these circumstances, the charge nurse's direction of others is constrained to such a significant degree that it is rendered routine. See *Dynamic Science, Inc.*, 334 NLRB No. 57 (2001); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). It is this substantial constraint on the charge nurse's direction of employees that distinguishes the instant nurses from the pilots found to be statutory supervisors in *American Commercial Barge Line Co.*, 337 NLRB No. 168 (2002), a case relied upon by the Employer.

5. Summary

Based on the foregoing, I find that the Employer, as the party asserting supervisory status, has not met its burden in proving that the charge nurses have the authority to discipline, evaluate, assign or responsibly direct other employees, or carry out any of the functions set forth in Section 2(11) of the Act, or to effectively recommend such functions and utilize independent judgment in the execution of such functions. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. at 1867. Therefore, I find the charge nurses are not supervisors within the meaning of Section 2(11) of the Act. Accordingly, I will include the charge nurses in the unit found appropriate here.

V. UNIT CONCLUSIONS

The Board has traditionally held that registered nurses are professional employees. *Mercy Hospitals of Sacramento*, 217 NLRB 765 (1975); *Centralia Convalescent Center*, 295 NLRB 42 (1989). Under the proscription of Section 9(b)(1) of the Act, professional employees cannot be included in a nonprofessional unit without their consent. The RNs, as professional employees, are entitled to vote on two questions: (1) whether they desire to be included in a group composed of non-professional employees, and (2) their choice with respect to a bargaining representative. *Sonotone Corp.*, 90 NLRB 1236, 1241-42 (1950). If the majority of professionals vote "yes" on inclusion, their votes are counted with the nonprofessionals; if the

¹⁴ Indeed, charge nurses spend about 60 percent of their time performing direct, hands-on patient care with the remaining time spent on paperwork and charting.

majority vote “no,” their votes are counted separately to determine whether they want the Petitioner to represent them in a separate unit.

Accordingly, I am directing elections in the following separate voting groups, one consisting of all registered nurses (RNs) and the other consisting of all licensed practical nurses (LPNs) employed by the Employer at its Charlotte Hall, Maryland facility:

(a) All full time and regular part time registered nurses (RNs) employed by the Employer at its Charlotte Hall, Maryland facility, but excluding all other employees, owners, director of nursing, assistant director of nursing, care plan coordinators, shift (evening and weekend) supervisors, unit managers, casual employees, guards and supervisors as defined in the Act.

(b) All full time and regular part time licensed practical nurses (LPNs) employed by the Employer at its Charlotte Hall, Maryland facility, but excluding all other employees, owners, director of nursing, assistant director of nursing, care plan coordinators, shift (evening and weekend) supervisors, unit managers, casual employees, guards and supervisors as defined in the Act.

Employees in voting group (a) shall be asked two questions on the ballot:

- (1) Do you desire to be included in a unit with non-professional employees?
- (2) Do you desire to be represented for purposes of collective bargaining by United Food and Commercial Workers Union, Local 400, AFL-CIO?

If a majority of the employees in voting group (a) vote “yes” to the first question, indicating a choice to be included in a unit with non-professional employees, the group will be so included. Voting group (a)’s vote on the second question will then be counted with the votes of the non-professional voting group (b) to decide the representative for the entire unit. If, on the other hand, a majority of the professional employees in voting group (a) do not vote for inclusion, these employees will not be included with the non-professional employees, and their votes on the second question will be separately counted to decide whether they want to be represented in a separate professional unit.

I make the following findings with regard to the appropriate unit:

1. If a majority of the professional employees vote for inclusion in a unit with non-professional employees, I find the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

All full time and regular part time registered nurses (RNs) and licensed practical nurses (LPNs) employed by the Employer at its Charlotte Hall, Maryland facility, but excluding all other employees, owners, director of nursing, assistant director of nursing, care plan coordinators, shift (evening and weekend) supervisors, unit managers, casual employees, guards and supervisors as defined in the Act.

2. If a majority of the professional employees do not vote for inclusion in the unit with non-professional employees, I find that the separate voting groups set forth above constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

DIRECTION OF ELECTION

An Election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group who were employed during the payroll period ending immediately preceding the date of this

Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the **UNITED FOOD AND COMMERCIAL WORKERS, UNION LOCAL 400, AFL-CIO**

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by **SEPTEMBER 27, 2002**.

Dated: SEPTEMBER 13, 2002

At Baltimore, Maryland

(SEAL)

WAYNE R. GOLD

Regional Director, Region 5

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